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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

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NO. 79-161

* * *

PHILIP ABBOTT MASQUELETTE,
Appellant,

V.

THE STATE OF TEXAS,
Appellee.

* * *

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

* * *

MOTION TO DISMISS

* * *

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The Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court, moves the Court to dismiss the appeal herein on the grounds that the questions sought to be reviewed were not properly raised below and expressly passed on, and that the questions presented are so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal purports to raise the question of the validity of the Uniform Act Regulating Traffic on Highways, TEX.REV.CIV.STAT. Art. 6701d, §169B. The portion of the Act at issue provides that the Texas State Highway Commission may by order and without additional legislation set temporary maximum speed limits below the statutory maximum of 70 miles per hour, if the Commission finds certain circumstances to exist, including a severe shortage of motor fuel and the need to foster conservation. Pursuant to Article 6701d, §169B, the Commission has set the maximum speed limit in the State of Texas at 55 miles per hour.

Section 143 of the Act provides that it is a misdemeanor to violate any provision of the Act, including exceeding the applicable maximum speed limit. The maximum punishment for this misdemeanor is a $200 fine.

B. The Proceedings Below

The Appellant, an attorney licensed to practice law in the State of Texas, was convicted of the offense of speeding (exceeding the maximum 55 MPH set by the Commission) in violation of §§166 and 169B of the Uniform Act Regulating Traffic on Highways, Article 6701d, in the Justice of the Peace Court, Precinct 1, of Fayette County, Texas. An appeal *de novo* was taken to the County Court of Fayette County, and the Appellant, after a second trial to the Court was again convicted of speeding, and a fine of $101.00 was imposed. No jail sentence was imposed or could have been imposed under the statute for the violation charged.

On appeal to the Texas Court of Criminal Appeals, the Appellant urged that he was denied due process under the Fourteenth Amendment to the United States Constitution because he was tried before a non-lawyer county judge. Additionally, the Appellant argued that the statute -- Article 6701d, §169B, TEX.REV.CIV. STAT. -- enabling the State Highway Commission to set temporary speed limits was an unconstitutional delegation of the State's legislative authority under the Texas Constitution. Appellant did not challenge the validity of the statute under the United States Constitution in the Court of Criminal Appeals, nor did that Court expressly pass on the validity of the statute under the United States Constitution.

The Court of Criminal Appeals rejected Appellant's contention that he was denied due process under the Fourteenth Amendment when he was tried in the County Court before a non-lawyer judge and affirmed the conviction and fine. 579 S.W.2d 478 (Tex.Cr.App. 1979).

II.

ARGUMENT

A. The Validity of the Texas Statute Was Not Properly Raised Nor Expressly Passed On By the Texas Court of Criminal Appeals.

The Appellant contends that Section 169B of the Uniform Act Regulating Traffic on Highways, Art. 6701d, TEX.REV.CIV.STAT., is repugnant to Article IV, Section 4, of the United States Constitution (the Guaranty Clause). Appellant did not raise this contention in the state courts. Although he argued that Section 169B constituted an unlawful delegation of legislative power under the Texas Constitution, he did not raise the *federal* constitutional question in the Texas Court of Criminal Appeals. In fact, Appellant's Brief in that Court stated the issue to be:

> Section 169B, Article 6701d, V.A.T.S. is unconstitutional in that same attempts to

> delegate a function of the legislature to the executive department, . . . to pass a law without specific action by both houses of the legislature, . . . to suspend a law of this State without action by the legislature . . . .

Brief of Appellant at pp. 7-8. The opinion of the Court of Criminal Appeals did not decide the contention which the Appellant now raises in this Court, since it was not presented to that Court for consideration.

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the validity of the state statute was raised in the state court at the proper time. *Tacon v. Arizona*, 410 U.S. 351, 352; *Cardinale v. Louisiana*, 394 U.S. 437, 438. Appellant's tardy attempt to raise this question in a petition for rehearing in the court below after judgment is improper and ineffective. *Radio Station W O W v. Johnson*, 326 U.S. 120, 128; *Herndon v. Georgia*, 295 U.S. 441, 443.

B. This Case Is Not Within The Appeal Jurisdiction of the Court.

No appeal from a state court judgment will lie unless there is drawn into question the constitutional validity of a state statute. Since Appellant did not properly raise the question of the validity of a state statute in the court below, and that Court did not consider or expressly decide the issue, there remains no basis for invoking the jurisdiction of the Supreme Court on appeal under 28 U.S.C. §1257(2).

C. The Appeal Does Not Otherwise Present a Substantial Federal Question.

The Appellant argues that his trial and conviction for speeding in the county court before a judge who was not a lawyer violated due process under the Fourteenth

Amendment. Although Appellant raised this contention in the Court below, it was properly rejected and is without merit.

The Supreme Court has never specifically addressed this issue. However, the courts of several states which have done so have concluded that the use of non-attorney judges is consistent with the demands of due process. *State v. Duncan*, 238 S.E.2d 205 (S.C. 1977); *Ex parte Ross*, 522 S.W.2d 214 (Tex.Cr.App. 1975), *cert. denied*, 423 U.S. 1018; *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972), *appeal dismissed*, 414 U.S. 885; *City of Decatur v. Kushmer*, 253 N.E.2d 425 (Ill. 1969); but cf. *Gordon v. Justice Court Yuba J.D. of Sutter Cty.*, 12 Cal.3d 323 (1974), *cert. denied*, 420 U.S. 938. (Right to lawyer-judge where jail sentence imposed).

It has never been suggested by this Court that the right to counsel carries with it the right to be tried by an attorney-judge, or that the right to be *tried* by a lawyer grows out of the right to be *defended* by a lawyer. *See Argersinger v. Hamlin*, 407 U.S. 25. Due process, as regards the tribunal hearing a case, has been considered to require only that the tribunal be fair and impartial or neutral and detached. *Morrissey v. Brewer*, 408 U.S. 471; *In re Murchison* 349 U.S. 133. Traditional concepts of fundamental fairness cannot be said to require that an accused be tried by a lawyer-judge, at least where, as in this case, the accused did not and could not suffer a deprivation of liberty. *Scott v. Illinois*, 440 U.S. 367.

Lastly, Appellant suggests that Texas' judicial structure which permits lay judges to preside in some county courts and law-trained judges in others denies him equal protection under the Fourteenth Amendment. This contention has already been considered and rejected by this Court. *North v. Russell*, 427 U.S. 328, 338.

III.

CONCLUSION

Wherefore, Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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November, 1979